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Supreme Court, U.S.
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Case No. 04-5462

In The

Supreme Court Of The United States

OCTOBER TERM, 2004

RONAL ROMPILLA

PETITIONER,

vs.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

RESPONDENT

CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

~~**MOTION FOR LEAVE TO FILE AMICUS CURIÆ BRIEF, AND**~~

BRIEF OF AMICI CURIÆ THE FRIENDS OF RONALD A. ROMPILLA

WITH APPENDIX

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MOTION FOR LEAVE TO FILE AMICI CURIÆ BRIEF

The Friends of Petitioner move for leave to file a brief in support of the petitioner on the grounds there are issues, and refinement of issues, not adequately dealt with in the Petition, the brief will aid this court in reaching a just result in this case, and a capital Petitioner should have as much help as possible.

The interest of Amici follows.

Dated November 7, 2004

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INTEREST OF *AMICI CURIÆ*

The Friends of Petioner are an unorganized group of individuals scattered throughout the United States who are opposed to capital punishment generally. Amicii are concerned that a decision in this court will affect the sentencing procedures in each of the severa; States, and therefore seek to uphold and defend the Constitution of the United States.

Friends believe that pro-life individuals should not take human life without substantial justification, and that the proection of society may be adequately protected by incarceration.

Pursuant to Rule 37.6, I hereby represent, that no counsel for a party authored the brief in whole or in part and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief on behalf of *amicii curiae*. The brief is being submitted *pro bono publico*.

-STATEMENT OF THE CASE AND FACTS

Amici Curiæ adopts by reference Petitioner's statement of the case.

SUMMARY ARGUMENTS

1. As the common law concept of sovereignty has been abolished and sovereignty now resides in the people, the only power the People can delegate to the government in its defense is reasonable force, and deadly force if reasonable.

2. In other contexts, Inernational law, a state must resort I the first instance to pacific means of protecting society, and the use of force only when reasonable, such that in a capital case the force required to protect society from further harm is incarceration.

3. Traditionally, persons that are a danger to society are incarcerated, and given modern peneological institutions available, in most, if not all, cases, the reasonable force required to protect society from further harm in a capital case is incarceration.

4. There has seen a gradual withdrawal of the death penalty as a form of punishment for all felonies at common law to a more modern view of a requirement of special circumstances in which the defendant has the requisite mental element and the victim dies, and withdrawal of exection from public view when used.

5. Statistical evidence suggests that the death penalty serves no legitimate governmental purpose as a deterance to crime.

ARGUMENTS

I.

EMERGING STANDARDS SUGGEST A JURY INSTRUCTION MUST INFORM THE JURY THAT BEFORE A VERDICT OF DEATH CAN BE RETURNED, THE STATE MUST DEMON-

STRATE THAT IT CANNOT CONTROL DEFENDANT'S CONDUCT BY MERE INCARCERATION

A. CONSTITUTIONAL PREMISE & FRAMEWORK; THE PEOPLE CAN ONLY DELEGATE REASONABLE FORCE FOR THE PROTECTION OF SOCIETY.

Sovereignty resides in the People. U.S. Constitution,[1] Preamble ["We, the People"].[2] The federal powers

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[1] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817) . The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85 (1809) . No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938) . Words and terms are to be taken in the sense in which they were used and understood at common law and at the time the constitution and the amendments were adopted. *Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869) ; *Locke v. New Orleans*, 4 Wall (71 U.S.) 172, (1866) ; *Gibbons v. Ogder.*, 9 Weat. (22 U.S.) 1, 188-189 (1824) ; *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) ; *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877) ; Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852) . Where there are several possible meanings of the words of the constitution, that meaning that will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 314 U.S. 707 (1941).

are expressly recognized as being delegated powers. U.S.Const., 10th Amendment. 1 Rotunda, Treatise on Constitutional Law §§ 3.1, 3.2. By its terms, the 10th Amendment implies that powers are delegated by the People to the State, and the concept is written into the California Constitution's Preamble.[3]

It has always been recognized that a Person could only grant that estate which he possessed. Blackstone, Commentaries on the Laws of England, Vol. 2, page 290;[4] Cheshire, THE MODERN LAW OF REAL PROPERTY, p. 660 (Citing common law principles). At the time the constitution was drafted, an individual could use only reasonable force for self-defense, and deadly force only when met with deadly force and its use is reasonable. If the attacker retreats or abandons the fray, then the victim can no longer use deadly force. Foster, CROWN LAW 273-277 (1762); *Brown v. United States*, 256 U.S. 335 (1921); Perkins, CRIMINAL LAW AND PROCEDURE (1972) 660-667; *Tennessee v. Garner*, 471 U.S. 1 (1986).

Because an individual at common law could only use reasonable force, and deadly force if reasonable [*Foster*], that is all the power the individual collectively can delegate to the States, hence the State may only use reasonable force, and deadly force if reasonable.[5]

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[2] While the result in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), may be correct, its *ratio decidendi* does not square with the Preamble and Article I §§ 9 & 10. Clearly, the President does not stand in the shoes of the King, because titles of nobility were abolished for an intended purpose. Farrands 28-33; Federalist Papers, ## 32, 39;. The framers placed sovereignty in the People. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) .

[3] The United States was established in the light of the Hobbs/Locke Theory of Social Contracts wherein the Government is established to protect the welfare of its citizens at home. 1 Rotunda 3.12 n.2. This is an internationally recognized duty of Nations. Verdross, *Jus Dispositivum land Jus Cogens in International Law*, 60 AJIL 55 (1961); Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937) ;. and recognized in the Preamble; and Art. I, § 8; of the U.S. Constitution. See also, California Constitution, Preamble ["We, the People"]; Cal. Govt. C. § 100(a).

[4] Blackstone; is a recognized source of the common law in aid of interpreting the U.S. Constitution. 1 Rotunda §§ 6.1 n.2, 15.11 n.4, & 23.8; n.1, para. 5 (p. 484, left column).

[5] Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). The Court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by the Court, the Court overruled, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown I*). *Accord, Bolling v. Sharpe* 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled.

Garner.

B. International Law Proscribes the Use of Unreasonable Force in Defense of State Interests

The rules of self-defense apply to states in International Law.[6] United Nations Charter, Chapter VI [commencing with Article 33]. It is considered a rule of *jus cogens*, vis peremptory norm of international law, from which no state may derogate. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1961), 60, #3; Id, *Forbidden Treaties in International Law*, 31 AJIL 571-77.[7] The concept is preserved in the United States Constitution, Art. I, § 1 (No State shall, ... engage in War, unless actually invaded

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Brown I, 347 U.S., at 488-89, 496 (1954); *Brown v. Bd. of Education*, 349 U.S. 289, 294, 298 (1955) (*Brown II*) (Nature of remedy to be utilized).

[6] Courts are bound by the law of Nations which is part of the law of the land. *The Nereide*, 13 U.S. 388 (1815); *INS v. Cardozo-Fonesca*, 480 U.S. 421 (1987) ; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980).

[7] In *People v. Ghent*, 43 Cal.3d 739 (1987), the court rejected an argument that the United Nations Charter and Declaration on Human Rights precludes the imposition of the death penalty, and in any event before those documents may be utilized, they must be either be implemented by Congress or self-executing. However, rules of *jus cogens* are recognized by multinational pact. The United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43; [Obligations imposed independently of treaty], Art. 53 [*jus cogens* and void treaties], U.N. Doc. A/Conf. 39/11. Moreover, Verdross points out that these laws, by their very nature, are self-executing. The argument made here centers on what process is due before it may be imposed.

... imminent Danger ...). It has been tacitly recognized by *stare decisis*. *Tennessee v. Garner*, 471 U.S. 1 (1986) [Striking down State's fleeing felon statute].

Once an individual is incarcerated, that is all the force required to protect society from further harm therefore the death penalty[8] would be cruel and unusual punishment, unless the State shows that society cannot be protected by incarceration.

C. Where Persons Are A Danger to Society, Incarceration is the Norm.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983) it was held that it was proper for the jury to consider whether or not defendant would commit criminal acts in the future and thus pose a threat to society. However, the court went on to say in *Solem v. Helm*, 463 U.S. 277 (1983), that we will not assume that there is no rehabilitative opportunity. *Accord, Hitchcock v. Dugger*, 481 U.S. 393 (1987) [reversing death penalty for refusal to consider mitigating circumstances].

Every day we incarcerate People who pose a threat to society. LPS Act, Welfare & Institutions Code § 5000, *et seq.*; Probate Code, § 1400, et seq.; Conservatorship and Wardship, Welfare & Institutions Code § 200, et seq.; Generally, NOTE, PROBATE CODE CONSERVATORSHIPS: A LEGISLATIVE GRANT OF NEW PROCEDURAL PROTECTIONS (1977) 8 Pacific L.J. 73. Thus, the relevant inquiry is not whether the defendant poses a fu-

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[8] The International Covenant on Civil and Political Rights, Part III, article 6(2), declares: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...." Ratified by the United States and 71 other countries, effective March 23, 1966. *E.g., People v. Ghent*, 43 C.3d 739 (1987) (Dissenting Opinion by Broussard and Mosk, JJ).

ture threat to society, an entirely speculative and subjective opinion of what may happen, but whether or not society can effectively control the behavior by incarceration, with a possibility of rehabilitation. That is to say, the emerging standards of decency is such that the State may not exact the death penalty unless it demonstrates beyond a reasonable doubt that it cannot protect society by mere incarceration.

D. THERE HAS BEEN A GRADUAL WITHDRAWAL OF THE DEATH PENALTY AS A FORM OF PUNISHMENT, AND WITHDRAWAL FROM PUBLIC VIEW WHEN USED.

At common law, all felonies, regardless of whether death resulted, and in theft cases, regardless of the amount taken, warranted the death penalty, except mayhem for which mutilation was substituted. Perkins, Criminal Law and Procedure (Foundation press, 4th Ed., 1972), p. 4-5. Whipping was substituted for death as the penalty for petite larceny, but that was a change from the common law resulting from an early statute. Id. Statute of Westminster, 1, c. 15 (1275). In the words of Blackstone, "the true criterion of felony is forfeiture." 4 Bl.Comm. *97. Modernly, few felonies are recognized as capital crimes. Perkins, at p. 5; *generally*, 4 Encyclopædia Britannica 847 (1971). Moreover, and notwithstanding *Apodaca v. Oregon*, 406 U.S.404 (1972), there is not a single jurisdiction left which allows the infliction of the death penalty with less than a unanimous jury verdict.[9]

The United States Supreme Court has recognized further restrictions upon the utilization of the death penalty. Thus in non-fatal felonies, the court held that

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[9] When *Apodaca* was decided, only two jurisdictions allowed the death penalty on less than a unanimous decision. Oregon required a 10-2 decision, but has since repealed its death penalty. Louisiana now requires a unanimous decision. ALI, MPC, p. 154.

the imposition of the death penalty was unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977); *Eberhardt v. Georgia*, 433 U.S. 917 (1977). Similarly, in *Enmund v. Florida*, 458 U.S. 752 (1982), the court held that in felony-murder cases, the death Penalty was unconstitutional where the accomplice did not commit murder, nor intend that death result. Then in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court distinguished *Enmund* on the basis that in *Enmund* "the degree of participation **was so tangential** that it could not be said to justify a sentence of death", and held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."[10]

Congress at one point abolished the death penalty altogether. Pub.L. 98-473, Title II, §§ 212(a), 235(a)(1), Oct. 12, 1984, 98 Stat. 1987-2020, 2031, effective November 1, 1987, adopting Chapter 227 - Sentences, 18 U.S.C. §§ 3551, et seq.[11] 10 States of the United States have abolished it. 4 Encyclopædia Britannica 847 (1971). Of 20 Latin American Countries, 10 have abolished it. Id. All but 4 Mexican States have abolished it. Id.[12]

At common law, and the early days of this Country, executions were a public affair designed as a de-

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[10] *Enmund* was outside in the getaway car, hence he was not in a position to prevent the homicides by co-defendants even had he wanted to. In *Tison*, on the other hand, the defendants were at the scene of the homicides, and made no effort to curb their father.

[11] Congress did not reinstate the mode of execution until September 1, 1994. 18 USC Sec. 3596.

[12] See footnote 6.

terrent. 3 Encyclopædia Britannica 404 (1971) [except heads of state]; 4 Id 847; 6 Id 825; 11 Id 64; 18 Id 556. At the restoration, Cromwell's body was exhumed, and his head displayed on a spike at the gates as a warning to all. 6 Encyclopædia Britannica 802. Common Law displays of execution have become a relict of the past. The last public execution occurred in Kentucky in 1936. 11 Encyclopædia Britannica 64. Under modern statutes, the public is excluded, witnesses limited to those found by law necessary to be present to assure the State that the law had been obeyed. Infliction of the death penalty has steadily been withdrawn from public view.[13] Former 18 U.S.C. § 3566 [Chap. 227]; California Penal Code § 3605. In the table set forth in the appendix, page A8, hereinafter, using statistics from the Statistical Abstrat of the United, States, based upon the number of murders per hundred thousand, the homicide rate remains fairly constant over the years with or without capital punishment suggesting an inelasticity of capital punishment as a deterent. The deterrent effect, if there ever was any deterrent effect, is gone.[14]

E. CONCLUSION

Capital punishment is no longer a universally recognized means of controlling human behavior. It has been withdrawn as a public spectacle, and restricted to a narrow class of cases in which a victim dies as a proximate result of the defendant's own culpable conduct. Most jurisdictions that do allow capital punishment require a unanimous verdict.

The sum total of the foregoing, implicit in *Garner*, is that the State may not use its sovereignty with any more force than is reasonable under the circumstances, and the death penalty is appropriate, if at all, only if the State has demonstrated that it cannot protect society by mere incarceration.

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[13] We can literally say "We have swept the death penalty under the carpet and out of view."

[14] The ALI Committee set out some rather stale statistical studies which failed to conclusively prove that capital punishment was or was not a deterrent. ALI, MPC, part II, vol. I, pp. 112-114. In the table hereinafter, using more current statistics, based upon the number of murders per hundred thousand, the rate remains fairly constant over the years with or without capital punishment suggesting an inelasticity for capital punishment. A statistician would be better qualified to render an expert opinion.

CONCLUSION

WHEREFORE, *Amicus Curiæ* pray, for all of the reasons and arguments set forth herein, this court reverse the judgment, and remand for further proceedings not inconsistent with this court's opinion, and such other and further relief as the court deems just and proper under the circumstances.

Dated: November 7, 2004

RESPECTFULLY SUBMITTED,

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APPENDIX

EXCERPTS FROM

2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

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* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

[163]

COMMITTEE OF DETAIL, IX

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IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

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[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

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[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

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[196]

Tuesday MADISON August 7

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up,

***

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

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[209]

Tuesday MADISON August 7

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

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[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee
of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]
THURSDAY, SEPTEMBER 13, 1787.
JOURNAL
Thursday September 13, 1787.

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Resolved that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

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[604]

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[To postpoine the report respecting the 22nd and 23rd Ayes --- 9; noes --- 1.]

*****

To strike out the word "to" before establish justice Ayes --- 8; bites --- 2,]

[641]
MONDAY, SEPTEMBER 17, 1787.
JOURNAL
Monday September 17, 1787.
Detail of Ayes and Noes

The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the

			President
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

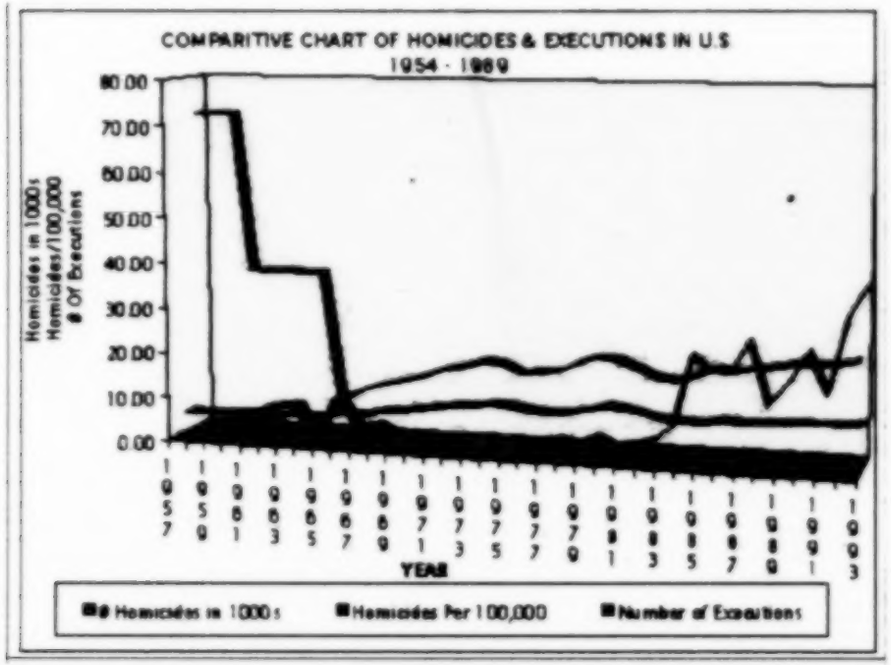
[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****



Source: STATISTICAL ABSTRACT OF THE UNITED STATES, 1963 (Table 197), 1969 (Table 199), 1976 (Tables 252 & 299), 1986 (Tables 279 & 329), 1996. Total Murders represent number of murders committed in United States. Number per 100,000 represents the number of murders per 100,000 persons in the United States.

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